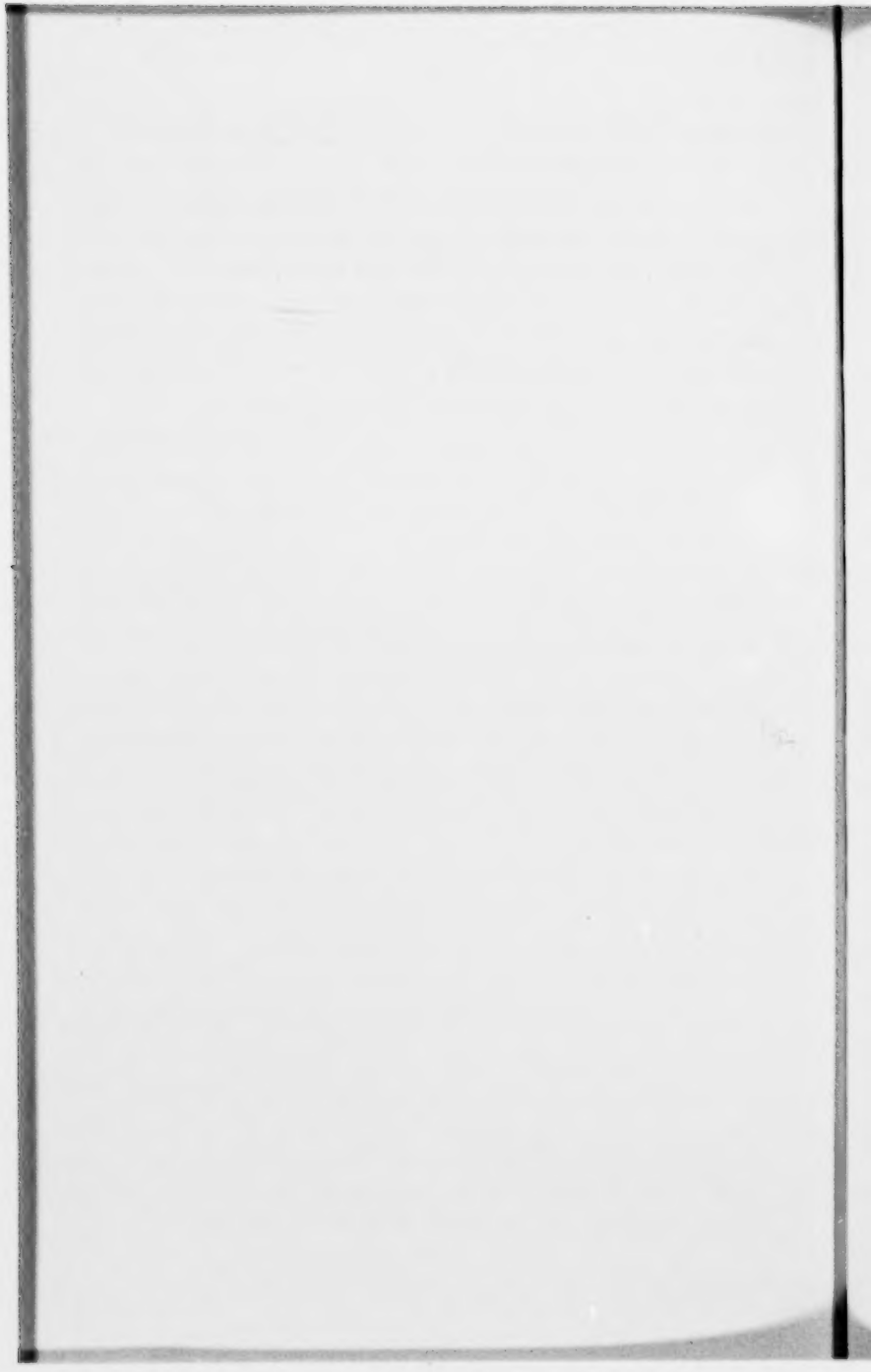


SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1084

EULARIA M. GATEWOOD, Owner of the Motor Vessel "Lillian Anne,"

Petitioner,

vs.

W. S. SANDERS, Owner of the Motor Tug "Fairwill," and THE R. C. HUFFMAN CONSTRUCTION COMPANY, a Corporation, Owner of the Scow No. 72-H.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In our petition we have set out in a general way the issues involved in this case. They involve the application of the pilot rules and the decisions of courts to the facts as produced. The story of the navigation, as far as the Motor Vessel LILLIAN ANNE is concerned, is shown by the testimony of R. W. Gatewood, which is set forth in full and appears at pages 59 to 107 inclusive in this record; also that of

J. S. Martin, who was acting as Mate, and was in charge of the navigation at the time, which is shown at pages 127 to 135 of the record inclusive.

Very briefly this testimony discloses that the Motor Vessel LILLIAN ANNE was engaged at the time in carrying men and equipment from the Norfolk Navy Yard, located at the Southern Branch of the Elizabeth River, to Solomon's, Maryland, and on this occasion had left the Navy Yard with 263 men aboard and was proceeding in a general northerly direction. The weather was fair at the time, it was still dark, and the speed of the LILLIAN ANNE had not exceeded 4½ knots, as sufficient time had not elapsed for her engines to warm up.

As the LILLIAN ANNE was proceeding in this general northerly direction she was keeping well over to her own starboard side of the channel and there was no other vessel at the time in the vicinity which would interfere with her navigation or with the navigation of the tug and scow. As they approached the intersection of the Eastern Branch channel, those on the LILLIAN ANNE observed the running lights of an approaching tug some 700 or 800 yards away and in such a position that both the red and green lights of the tug were visible. They also observed the towing lights on the tug indicating that there was a tow, but due to the absence of any proper lights on the tow, properly placed, they could not tell in just what position the tow was being carried. This being the situation, the LILLIAN ANNE gave a signal of one blast of her whistle and directed her course to starboard. There is no dispute in the evidence on this point and this is exactly what the rule which has been quoted above prescribes. They proceeded upon this course for a short while, but heard no answer from the approaching tug. Instead they noticed that the tug's red light closed and only her green was showing indicating that the tug, instead of complying with the passing signal which had been

blown, was directing her course to port which would be turning into the Eastern Branch channel. Immediately upon observing this maneuver the master of the LILLIAN ANNE ordered his engines full speed astern and blew his signal of three blasts to indicate that fact. Again, this was in strict compliance with the rule. The LILLIAN ANNE, having a lefthanded engine, canted her bow to port under the reversed propeller. Shortly after this three blast signal from the LILLIAN ANNE, and when the vessels were almost in collision, the tug then for the first time blew backing signals indicating that she was putting her engines full speed astern, and immediately the LILLIAN ANNE repeated her backing signals. The effect of the reversed engines on the tug was to cant the tug's bow to starboard.

What error there could have been in this navigation of the LILLIAN ANNE we fail to see. It was strictly in compliance with the rules of the road and naturally the master of the LILLIAN ANNE expected the tug also to comply with the rules of the road.

As to the navigation of the tug and scow. We also printed in our appendix in full the testimony of George K. Hudgins, who was in charge of the navigation at the time, and whose testimony will be found on pages 25-59 inclusive of the record; also the testimony of Eugene Hudgins, a deckhand, page 108 of the record; and Thurman Woodard, a scowman, at page 141 of the record. This scow was being used in carrying mud from the dredge up the Eastern Branch of the Elizabeth River to the dumping grounds near Craney Island flats, and at the time of this collision was being towed back down the Elizabeth River and when they got to the intersection of the Eastern Branch would necessitate a rather sharp turn to her left, or port, in order to reach her destination. Such a turn would be directly across the course of the Motor Vessel LILLIAN ANNE.

At the beginning therefore it is quite obvious that the objectives of the two vessels were such that there was no cause or necessity for any particular turning on the part of the LILLIAN ANNE, but there was a necessity for a sharp change of course on the part of the tug and tow, and if we keep these objectives in mind they will explain the reasons behind the negligent acts which were emphatically shown in the record.

There were numerous errors charged against the tug and tow.

There Was No Competent Person in Charge of the Tug

This is at the very root of the trouble.

The tug was running one man short of her complement when the master left the tug shortly before he placed in charge Mr. Gray, who was acting as engineer; and the reason assigned for this unusual thing was that he thought the owner would be better satisfied with this man than with any other member of the crew. It does seem a little unusual for an acting engineer to be placed in charge of navigation over the mate, and it especially emphasizes the doubt that must have existed in the mind of the master as to the fitness of the mate to carry on the navigation, and, as we shall show in this argument, that idea of unfitness was thoroughly justified.

It so happened that on the trip from Craney Island that morning the tug developed engine trouble and she could proceed only under one bell. Mr. Gray then went down into the engine room and was working upon the engine when this collision occurred. There was only one man forward on either the tug or the scow and that was George K. Hudgins who was in the pilot house, with no one to assist him, no one on lookout and he being unfamiliar with the waters in that locality. Mr. Gray, the man in charge of

navigation, but who was not in the pilot house at the time, held no license whatever, his only permit being a motor boat permit. And yet he was entrusted, not only with the safety of the tug and its tow, but with the duty of navigating in a channel where he would necessarily meet other vessels.

So we come to an inspection of mate Hudgins, and we find that his qualifications are sadly lacking. He was an elderly man who had held a second mate's license, but had no license at all for Norfolk Harbor (R. 38). Twenty years before he had sailed on the Merchants & Miners steamships, but since that time his principal job had been fishing (R. 39). However, he had never brought fish down to Norfolk Harbor (R. 39). Likewise, before this venture he had never done any tugboating (R. 36). But worse than all, he was so ignorant of the situation that he didn't even know where the Southern Branch of the Elizabeth River was! The nearest he could come to it was that he thought it was somewhere in Berkley (R. 35-36-51), and everyone knows, who is at all familiar with Norfolk Harbor, that the Southern Branch is one of the most, if not the most, important watercourses in this area. As a matter of fact, the United States Navy Yard is located upon it, to say nothing of one of the largest industrial developments in the state. His eyesight was bad (R. 27). His hearing was bad (R. 27). And when he made his turn into the Eastern Branch (and across the course of the LILLIAN ANNE), he thought his course was northeast (R. 52). He did not recognize the rules of the road by their number (R. 46). And when he was being pressed upon cross-examination and evidently became so conscious of his own shortcomings, he finally exclaimed "Call me by name. I never was captain in my life" (R. 54).

This was the man solely navigating the tug and scow at the time of collision, without benefit of any assistance whatever from deckhand, lookout, or anyone at a time when it was very dark and with a scow projecting 70 feet forward

of the stem of the tug. Is it any wonder he neither saw nor heard the approaching vessel! After the collision, the engineer, Gray, took over the navigation (R. 115).

Mate Hudgins had no license for the waters in which he was navigating. Engineer Gray had no license but only a motor boat permit. The defect in the rule allowing these vessels to be operated by other than licensed men enables an owner to pick up anyone he chooses to operate his boat. The absence of a license certainly bears upon the competency of a man. In the INLAND, 45 Fed. Sup. 265; 1942 A. M. C. 1007, this point is well made by the judge as follows at page 267:

> "It appears also that Tartar was an unlicensed man and though he was not required to be a licensed man, yet that might indicate a lack of experience and must be considered."

Those on the Tug Did Not See the Lillian Anne Until It Was Too Late to Avoid a Collision

It is established that mate Hudgins did not see the LILLIAN ANNE until he was so close that collision was inevitable. When Hudgins first saw the LILLIAN ANNE the vessels had gotten into such a position that he only saw the red light on the LILLIAN ANNE, and about a point and a half on the tug's starboard bow (R. 47). Had he observed the approaching vessel in time, he should have seen both red and green lights, just as Captain Gatewood on the LILLIAN ANNE saw both of the tug's colored lights.

On direct examination mate Hudgins testified that the vessels were 400 to 500 yards apart when he first observed the LILLIAN ANNE. This testimony was given in court at the trial of the case on October 23, 1944, nearly two years after the time of the collision. His attention was then directed to the testimony which he had given before the U. S. Inspectors, under oath, less than a month after the collision, at

which time, he swore to the fact that the distance between the two vessels was only "75 or 100 yards." And this sighting of the vessels he claims to have made at the same time he heard this one blast signal (R. 30-31). It was then called to his attention that during the course of his testimony before the Inspectors he had made that statement in several different places. This, following in a very short period after the collision, is convincing evidence of his failure to see, and he admitted that was his best judgment at that time.

Q. "And you would not have told them that if that had not been your best judgment at that time?

A. At that time I didn't measure it. It is quite difficult to remember it, but I meditated over it and that was my best judgment at that time" (R. 30). He then attempted to say that his mistake was in saying 400 feet when he should have said 400 yards, and it was immediately called to his attention again that he had not mentioned the figure 400 at all and that his estimate of distance was "75 to 100 yards".

And this is borne out by another statement that mate Hudgins made. On the 10th day of November, 1942, only five days after the accident happened, he gave a full statement with reference to the facts of this collision and stated that "I saw the red light only on a vessel which was about a point or point and a half off my starboard bow. This vessel was about 400 feet away from my vessel at this time as far as I could estimate." This statement was notarized and the existence of it was unknown to appellant Gatewood or her proctor until after the evidence had been taken in the main case. The case was subsequently set down for oral argument before the District Judge and in the interim between the taking of the evidence and the time of the argument, the existence of this affidavit was discovered by proctor, whereupon he gave notice to proctors for the tug and at the time of argument tendered a petition and order making this a part of the evidence in the record, the fact of giving the

statement not being denied by proctors for the tug. The Court for some reason denied the motion, exception was taken and an assignment of error was directed to this action of the court.

So we find that in five days from the time of the collision he had given the distance as only 400 feet, which was entirely too close for any maneuvering to avoid a collision, and fails to explain why these lights had not been seen at least two miles away.

We have a situation where the navigator of the tug, five days after the happening, signed and swore to a statement before a notary public as to the shortness of distance; within less than a month after the accident, he gives his testimony before the United States Inspectors again as to the shortness of the distance; and then at the trial of the case, practically two years after the collision, attempts to greatly enlarge the distance. The reason for it is obvious! "The smallest slip of paper is sooner to be trusted for truth than the strongest and most retentive memory ever bestowed on mortal man." (Lumpkin, Jr., in Miller v. Cotten, 1848, 5 Ga. 341.)

That the vessels were practically on top of one another before Hudgins ever saw the LILLIAN ANNE is also borne out by the other evidence from the tug, and we now especially refer to the testimony of Eugene Hudgins, the deck hand. He was in the galley when he heard a whistle calling him on deck. He promptly went out on deck on the port side in front of the pilot house and saw the LILLIAN ANNE coming. Remember that this is the one-blast signal from the tug which mate Hudgins says he gave when he first observed the LILLIAN ANNE. When Eugene Hudgins, the deck hand, stepped on deck and saw the LILLIAN ANNE she was only "about 40 or 50 feet; and she was a little bit off our starboard bow" (R. 108 and 112). Also, the only other signal from his own tug was a three-blast signal indicating that he

was reversing his engines (R. 112). So we have a situation where the first signal, if it was intended as a passing signal, was given when the vessels were only 40 to 50 feet apart, at which time he saw the LILLIAN ANNE on the starboard bow showing its red light (R. 113). On page 114 his attention was called to his testimony before the Inspectors as follows:

"Do you remember this question and answer?
'Q. What whistles were blown?
A. A one-whistle and then I came out on deck, and later on, not over a second, I heard three whistles.'
Q. Do you remember making that statement?
A. Yes Sir."

This coincides with the testimony given by Gatewood, master of the LILLIAN ANNE, that he never heard any one-blast signal from the tug at all in response to his own original one-blast signal, and that the three-blast signal from the tug was not blown until the vessels were about 25 feet apart (R. 81). Right here, also it may be pertinent to comment on thi sone-blast signal from the tug. Those on the LILLIAN ANNE testified they never heard any such signal. Mate Hudgins testified he gave a one-blast signal (even though he changed his course to port), but in this testimony from the deck hand, Eugene Hudgins, we find that the signal which was given on the tug at the time when the vessels were very close together, was the usual call from the pilot house for the deck hand to come out. We quote from page 204 of the deck hand's testimony as follows:

"Q. And you heard this one blast which called you on deck?
A. Yes, sir.
Q. That is the usual call from the pilot house for the deck hand, isn't it?
A. Yes, sir, one blast.
Q. And it was the same kind of call that they had made for you to come out before, wasn't it, on occasions?
A. Yes, sir.

• • • • • • •

Q. What kind of whistle was that, was it just a short blast sufficient to draw your attention?
A. It was a one blast whistle, yes, sir."

It is quite apparent from this that the one-blast signal was merely the ordinary call for the deck hand to come forward and was in no sense the regular loud signal which would be blown to an approaching vessel.

This shortness of distance before observing the LILLIAN ANNE is also shown by the witness Thurman Woodard. This young man was the scowman on the 72-H and as the vessels were approaching one another he was in the engine room, where it seems most of the crew congregated while Mr. Gray was trying to work on the engine (R. 114). He heard the whistle call from his own tug just as he was "starting out of the engine room" and then he heard the three-blast signal by the time that he got "up near the galley door" (R. 141). When he came out on deck he observed the LILLIAN ANNE about 50 feet off (R. 141).

And yet, in the face of this evidence from the tug, the Court found in its memorandum opinion that the FAIRWILL was the first to make the observation of the approaching vessel, and that it did so at a point from 400 to 500 yards distant and probably more! There must be an exercise of judicial discretion in any finding, and to disregard utterly the testimony from the tug itself under such conditions, is not justified. Also, as we shall point out later on, if the tug had observed the LILLIAN ANNE at any such distance, it is all the more to be condemned for crossing the LILLIAN ANNE's course and in not complying with the passing signal.

The Tug Disregarded the Rules of Navigation

The tug and scow were originally proceeding in a general southerly direction down the main channel of the Elizabeth River, their object being to make a port turn into the Eastern Branch to go to the dredge, when they saw, or should have

seen, the LILLIAN ANNE approaching, head on, or nearly so. The navigation is controlled by Article 18, Rule 1 of the Pilot Rules, which is as follows:

> "When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.
>
> "The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each vessel is in such a position as to see both the sidelights of the other.
>
> "It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead."

Under the circumstances of this case, it was the duty of the tug to refrain from turning and crossing over the course of the LILLIAN ANNE, but to make a port-port passage. When Mate Hudgins was asked if he was familiar with Article 18, Rule 1, he answered: "I don't remember" (R. 46, 47). And yet this is one of the fundamental rules

in navigation. As a matter of fact, if he intended his one-blast signal as an answer to the LILLIAN ANNE's one-blast signal, we find him in in the position of assenting to a port-to-port passage and then deliberately violating both the rule and the signal. This is a fundamental duty from which he cannot escape, and having been guilty of a violation of the rule, the burden is upon him to show that not only was it probably not a cause of the collision, but that it could not have been. This Court is very familiar with the law as laid down in THE PENNSYLVANIA, 86 U. S. 125, as follows:

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

If It Is a Crossing Case, the Tug Was Again at Fault

Upon cross-examination, mate Hudgins had testified that when he first saw the LILLIAN ANNE the vessels had gotten into a position where he only saw her red light, with the LILLIAN ANNE about a point and a half on the tug's starboard bow. He was thereupon asked the question (R. 47):

> "Q. So that made it a crossing course?
> A. Yes, sir.
> Q. And in a crossing course the vessel to the starboard has the right-of-way, isn't that correct?
> A. The vessel to the starboard, yes, sir."

He was then asked if he knew what Article 19 of the Pilot Rules provided, and again he answered that he did not (R. 46). The Rule was then read to him, and he then stated

that he knew about it. The pilot rule governing such a situation is as follows:

> "Article 19: When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side, shall keep out of the way of the other."

Articles 22 and 23 of the Pilot Rules:

> "Article 22: Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."
>
> "Article 23: Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

In order to make the situation as clear and as emphatic as possible mate Hudgins was asked the following questions and gave the following answers on cross-examination:

> "Q. There was one answer you made to Mr. Jett that I meant to ask you a little something about. You said that the LILLIAN ANNE 'had the right of way over me', is that correct?
>
> A. Yes, sir.
>
> Q. Now, why did he have the right of way over you?
>
> A. The LILLIAN ANNE?
>
> Q. Yes.
>
> A. Well, he had me on his port side, showing me his red light, and about a point and a half on my starboard bow.
>
> Q. So, that made it a crossing course, didn't it?
>
> A. Yes, sir.
>
> Q. And in a cross course the vessel to the starboard has the right of way; isn't that correct?
>
> A. The vessel to the starboard, yes, sir.
>
> Q. And what is the duty upon the burdened vessel that does not have the right of way? Do you know that?

A. What is the duty on her?

Q. Yes.

A. She is supposed to slack her speed and give the other fellow the right of way.

Q. Yes. No, I will read you Article 19:

> 'Where two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.'

You remember that now, don't you?

A. I remember that now, yes, sir—that is steam vessels, yes, sir.

Q. Well, that applies to any vessel which is propelled by machinery, does it not?

A. Yes."

To connect this situation up, we refer further to Hudgins' testimony at R. 49 as follows:

> "Q. When you saw him 400 yards off—let us take that aspect of it—in what space could you have stopped your tug and scow?
>
> A. What, sir?
>
> Q. In what space could you have stopped your tug and scow?
>
> A. Oh, I suppose she stopped in, surely 50 or 60 feet. She didn't have much headway on her.
>
> Q. She could stop in 50 or 60 feet?
>
> A. 75, anyway" (R. 47).

The Court below found that it was not a crossing case. It only became a crossing case when the tug, without observing the proximity of the LILLIAN ANNE, turned to its port across the course of the LILLIAN ANNE; but mate Hudgins, when he first observed the LILLIAN ANNE, had gotten himself into the position where he had this vessel on his starboard and could observe only her red light so that to him it was a crossing case as he testified. Here again, if it was a

crossing case, he failed to keep out of the way. Instead of keeping out of the way we find that he claims to have blown a one-blast signal to the other vessel. And this on a supposition on his part that it was a crossing case!

So we have the mate caught in the dilemma that if it was a meeting head-on situation he did not comply and pass port to port; if it was a crossing case as mate Hudgins finally decided it to be, he gave a passing signal instead of giving the right-of-way to the other vessel.

In the case of *The Haven Belle* and *The Seminole*, 85 Fed. (2d) 939, this Honorable Court said with reference to a crossing situation:

> "As the Haven Belle had the Seminole on her starboard bow, her duty to change her course and speed to avoid the collision was clear; Inland Rules, art. 19. And there is little question that the proper maneuver under the circumstances was to steer her course to starboard and pass under the stern of the Seminole. Instead of doing this, she veered to port in an attempt 'to get away from' the Seminole, and we think it clear that she was in fault in thus attempting to cross the course of that vessel. Knight's Modern Steamship (8th ed.) pp. 447-452."

There Was No Lookout on Tug or Scow

In this connection it is to be remembered that at the time it was very dark and the scow was projecting 70 feet ahead of the tug thus making a somewhat awkward tow.

The law requires that a lookout must be kept from a point where it can best be performed. Here we have a situation in which a small tug lashed to the starboard quarter of a light scow high out of the water and extending 70 feet forward of the stem of the tug has no lookout whatever at any point. The only person forward on either vessel was mate Hudgins, who was alone in the pilot house of the tug.

This dark object, being a scow, discolored by the mud which it was hauling, navigating while it was still very dark, constituted a menace to navigation. It was not a type of vessel which could easily be seen and was in such position and height that it formed an obstruction to anyone on the tug. According to the evidence this scow had a free board of from 8 to 10 feet, then in addition there was a coaming of 2 feet, making a total height above the surface of the water of from 10 to 12 feet over which anyone on the tug had to look. Having in mind the size of the tug it is difficult to see how the mate in the pilot house could see over this high obstruction extending along his port side and running forward for such a distance; and we respectfully submit that this contributed to mate Hudgins' failure to see the LILLIAN ANNE approaching until she was within 75 yards of her. Undoubtedly it was not until the tug swung its tow to port to head up the Eastern Branch channel that he could then see from ahead and to his starboard the LILLIAN ANNE'S red light.

Both the scowman and the deck hand of the tug were not on deck until this signal was given by mate Hudgins calling the deck hand. He then saw the LILLIAN ANNE'S red light practically on them.

This is in sharp contrast with the lookout kept upon the LILLIAN ANNE which observed the lights of this tug from 700 to 800 yards away and navigated accordingly.

In the case of *N. Y. P. and N. Ry.* v. *Wilkins*, 248 Fed., affirmed 257 Fed. 42, a N. Y. P. and N. tug was towing one of its car floats on a hawser. The question of lookout on the barge came up, and Judge Waddill held that not only should there be a lookout on the tug forward, but there should have been a lookout on the barge. We quote from his opinion at page 828 as follows:

> "Moreover, as is evident from the result in this case, good seamanship required, while operating tows of this

character over the course in question, that a lookout should be stationed upon the forward end of the barge, immediately over the water, from which position he could see and observe objects ahead, and from either side, from which danger might be anticipated. The Vedamore, 137 Fed. 844, 70 C. C. A. 342. Had such lookout been so stationed, this little gasoline launch, from whatever direction it appeared, would have been seen, and could have been readily warned off, as it was only 30 feet long, and could almost certainly, in her own length, have swung around and away from the impending peril in which it had been entrapped. Besides, a lookout so stationed could, as shown by the testimony, have released the trigger, thrown off the hawser, and dropped it overboard. The collision could thus have been avoided, regardless of whether the launch approached the car float on its starboard or port side."

See also, *Lehigh Valley R. R. Co.* v. *N. Y. Central, etc.*, 1928 A. M. C., p. 1875; *Reliable Fuel Supply Co.* v. *Palmer, et al.*, 1940 A. M. C., p. 847.

The Scow Was Improperly Lighted, If At All

The duty, we submit, to have the scow properly lighted was one which rested upon both the tug and the scow. The libellant Huffman Construction Company had one of its own employees on board the scow as a scowman, Thurman Woodard, and it was his duty to see to the lights. On the other hand, it is also the duty of the tug to see that its tow is properly lighted, and in this instance the tug was lashed along the starboard quarter of the scow.

There is no doubt of the fact that at the time of the collision it was very dark. Captain Gatewood of the LILLIAN ANNE states that it was "black dark night" (R. 96). Captain Martin on the LILLIAN ANNE as mate corroborates this fact (R. 128). And mate Hudgins in the pilot house of the tug, when asked about this situation, said: "Oh, it was

dark—the darkest hour is just before day you know, and a ticklish time to pick up lights, too, but the weather was fair". Therefore, lights should have been carefully attended to. It is our contention that there were no lights placed upon this scow. There was testimony from the scow and the tug that two lanterns had been placed. Even if true, certainly they were not located in conformity with the rule. The pilot rule with reference to lights to be carried by this type of vessel is as follows:

> "Scows when being towed by steam vessels on the waters covered by the first paragraph of these rules shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles."

The main point of this rule is that there shall be a white light at each end of the scow carried 8 feet above the water and "so placed as to show an unbroken light all around the horizon." It was for this reason that proctors for the tug proved the height of the deck of the scow to be at least 8 feet above the water. The testimony from the two men in the pilot house of the LILLIAN ANNE is positive that there were no lights on this scow and the witness Phelps, who came out on deck, saw no light, although he looked at the scow as it went down the port side of the LILLIAN ANNE after the collision. Not only was there the ordinary vision, but after the collision the searchlight of the LILLIAN ANNE

was turned on the scow in an attempt to observe what was on her and no lights or lanterns could be seen. Neither lantern was produced in court.

The Forward Light: By the evidence of the tug and scow it was proved that this forward light was an ordinary white lantern which was merely placed on the deck of the scow and immediately in front of the two feet high coaming and about 4 feet from the port forward corner of the scow. Obviously, it was impossible to see this light all around the horizon as the rule so plainly requires. It was placed in a position where a view of it was obstructed, and this would be especially true in any maneuver wherein the scow might be turned to her port such as was done in the present instance. They do not claim to have any poles or stanchions to which these lights might be fastened, but the forward light was merely placed upon the deck as above described.

The After Light: This is stated to have been placed on top of the pump house about in the center of the scow. The rule required it to be placed at a height where it would show an unbroken light all around the horizon, and at the after corner of the scow. The tug was lashed alongside the starboard quarter of the scow and the placing of a white lantern, if it was actually there, in the center of the scow aft, could very easily be mistaken for a light on the tug. Both lights, if there were any, being improperly placed, this was a clear breach of the regulation; and there again the burden of proof is heavily upon the libellant under the case of *The Pennsylvania.*

It is also a well settled principle of law that the absence of proper lights on the barge is a fault not only of the barge, but also of the attending tug. *Elmhearst* v. *Sacony,* 123, 1935 A. M. C., p. 275, 10 Fed. Supp. 341.

There Was a Duty on the Tug to Blow Danger Signals and to Go Astern Sooner Than She Did

We have already adverted to the fact that the tug and scow could have been stopped within a very short distance (R. 49), putting it as at a maximum of 75 feet. If, therefore, he saw the LILLIAN ANNE 75 yards away or 400 yards away, it makes no difference which, there is no possible excuse for his not stopping his engines and going into reverse in order to avoid the danger of collision. He had already admitted that the tug and scow were the burdened vessels.

The mate in charge of the tug knew what no one else on the river knew, and that was that he was attempting to handle a large, unwieldy mud scow, and with a crippled engine. Therefore, the duty was upon him to exercise extraordinary precaution in the face of danger. There was no way for the navigators of the LILLIAN ANNE to know about this. And this especially applies when mate Hudgins knew he had to make this turn. Therefore, with this knowledge in mind, when he first saw the LILLIAN ANNE, whether it be 75 to 100 yards off or 400 yards off, and saw only her red light, that should have indicated to him a situation of danger which necessitated immediate action. Instead, he simply blew, according to his own testimony, a signal of one blast and kept ahead. This is certainly a violation of the rule and in total disregard of all of the principles of good seamanship. With reference to the duty of the tug and tow in such a situation, we refer to the following cases:

The San Clemente—Carolinian, 1941 A. M. C. 1101;
The Lady Lu—Harolmi III, 1944 A. M. C. 650, 138 Fed. Sup. 309;
The Exeter—Trim, 1940 A. M. C. 91, 30 Fed. Sup. 283.

There Was No Negligence in the Navigation of the Lillian Anne

In spite of the fantastic maneuvering of the tug and scow as above discussed, the Court completely exonerated Mate Hudgins and put the full blame for the collision upon the LILLIAN ANNE. And with all due respect to the District Court, we feel that it got a picture in his mind of a situation in exact reverse.

We have referred to the maneuvering of the LILLIAN ANNE heretofore necessarily so in connection with a discussion of the handling of the tug and scow. There was no dispute as to the lights of the LILLIAN ANNE and that they could be seen, nor as to her position on her own starboard hand side of the channel. She gave a proper passing signal when observing both running lights of the tug and directed her course a little to the starboard in compliance with that signal. There was no danger in the situation as far as was apparent to the navigators of the LILLIAN ANNE until the tug made its turn to port across her course. The LILLIAN ANNE's engines were stopped and reversed full speed, and a signal blown to that effect, and there is considerable testimony to the fact that she had killed her headway in the water at the time of the collision.

All of this was strictly in accordance with the Pilot Rules and we do not deem it necessary to go into further details concerning this navigation.

This Is an Important Maritime Question of Local Application Conflicting Seriously With Applicable Decisions

The questions raised on this application involve the application of the Pilot Rules and of the long-settled principles as laid down in the decisions with reference to the navigation of vessels. The decision of the Appellate Court affirming the District Court completely overlooked and ex-

onerated all these infractions of the rules by merely adopting a statement of fact which, as we have shown above, does not coincide with the testimony of the witnesses. If we are to follow the rulings of these two decisions then our admiralty practice has been thrown into a confusion which will seriously affect the handling of future collision cases occurring in this district.

We have elaborated upon the admitted negligences of those in charge of the navigation of the tug in order that the Court may see clearly the infractions of the rules and principles applicable to admiralty.

> They blandly admitted the improper placing of the two lights which were supposed to be placed upon the scow.
>
> They had an unlicensed and incompetent man in charge of the navigation of the tug.
>
> They had no lookout either on the tug or scow.
>
> They failed to see the LILLIAN ANNE until they were too close to avoid the collision.
>
> They being the burdened vessel the tug failed to keep out of the way.
>
> They failed to give any proper signals as required.
>
> They failed to stop and reverse their engines in time as required.

In spite of all of these several items of fault which are supported by the evidence to which we have heretofore referred the Court failed utterly to recognize the principle as laid down especially in the case of the *Pennsylvania*, 86 U. S. 125. By that case the burden rested upon the tug of showing not merely that all of these faults *might not have been* any of the causes or that they probably were not, but *that they could not have been.* There has been no more settled rule, up until this time, than this principle as laid down by the Supreme Court, and yet it was flagrantly omitted in the decision of this case.

There could be no more well settled rule than is laid down in the decisions concerning lookouts. In the case of tug and tow this was emphatically stated by Judge Waddill in the case of *N. Y. P. & N. Railway* against *Wilkins,* 248 Fed., Affirmed 257 Fed. 42, a decision of our own Fourth Circuit.

The Pilot rules, Articles 18, 19, 22, and 23, are also controlling and the necessity for observing them has been stated by the courts too many times to need reference and yet we find that the tug violated them as is shown by the evidence above quoted.

The Pilot rule with reference to lights which has been quoted above is mandatory and the failure properly to observe its terms cannot be lightly excused.

The result is that we find this decision running contrary both to the well decisions and the terms of the Pilot rules themselves, and thereby creating a disruption and confusion with reference to the admiralty practice.

The Decision as It Now Stands Has So Far Departed from the Accepted and Usual Course of Judicial Procedure as to Call for the Exercise of This Court's Power of Supervision.

It is unnecessary further to enlarge upon the variances between the procedure followed in the decision of this case and the long and well settled line of practice and heretofore established by rule and decision. The result of this departure is not only to work a gross injustice upon the private individual but to disturb and make uncertain the future handling of maritime collision cases. This court is the only tribunal that can remedy this situation and we earnestly invoke its power of supervision in the present case.

Conclusion

For the reasons heretofore stated, we respectfully request this court to review and reverse the decisions of the Circuit Court of Appeals for the Fourth Circuit and of the District Court of the United States for the Eastern District of Virginia and for such other relief as may be proper in the premises.

Respectfully submitted,

LEON T. SEAWELL,
Counsel for Petitioner,
936 Wainwright Bldg.,
Norfolk, Virginia.

(4102)